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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-[illegible]

KEITH ROBERTS, *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., TRANS WORLD AIRLINES, INC., AND UNITED AIRLINES, INC.

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February 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A of the Petition) is reported at 521 F.2d 298. The opinion of the Civil Aeronautics Board (Petitioner's Appendix in the Court of Appeals, pp. 104-48) is not yet reported.

QUESTION PRESENTED

Whether the Court of Appeals was correct in affirming the Civil Aeronautics Board's dismissal of a complaint for restitution of airline fares collected under procedurally defective tariffs, on the basis of the Board's findings that the fares were not unjust and unreasonable and that restitution would not be equitable.

STATEMENT

This proceeding arises out of a complaint filed with the Civil Aeronautics Board by a group of Congressmen, claiming restitution from the Nation's airlines for fares collected in 1969 and 1970 under tariffs invalidated by the Court of Appeals in 1970. After full investigation, the Board dismissed the complaint, and the Court of Appeals affirmed. Petitioner, although not a party to the complaint dismissed by the Board, now seeks review of the lower court's decision.

In September 1969, the Civil Aeronautics Board suspended passenger fare increases proposed by a number of airlines. At the same time, recognizing the carriers' urgent need for additional revenue, the Board prescribed a formula for lesser fare increases that it would find acceptable. The carriers filed tariffs conforming to the Board's formula, which resulted in a general fare increase of approximately 6 percent, effective October 1, 1969.

A group of Congressmen headed by Representative John E. Moss sought judicial review of the Board's actions, and in July 1970 the Court of Appeals for the District of Columbia Circuit found the fare increase to have been unlawful, *Moss* v. *CAB*, 430 F.2d 891. The

court held that the Board's prescription of a fare-increase formula had constituted agency ratemaking for which applicable notice and hearing requirements had not been observed.

Shortly after the Court of Appeals rendered its decision, the Moss Group filed a complaint with the Board, asking the agency to determine appropriate equitable relief for alleged fare overcharges during the period the invalidated tariffs were in effect. (New fares replacing those struck down by the court went into effect on October 15, 1970.) The Board thereupon instituted an investigation to determine whether the fares charged from October 1, 1969, through October 14, 1970, were unjust and unreasonable and, if so, the amount of any resulting overcharges.

Meanwhile, several groups and individuals had brought suits in various courts seeking redress for these alleged overcharges. Petitioner filed a purported class action against American Airlines, Inc., in a California state court in November 1970. This suit was removed to federal court and, along with the similar suits filed by other parties, was transferred to the District Court for the Northern District of Illinois. That court stayed all of these proceedings pending the outcome of the Board's investigation.

The Board assigned its investigation to an administrative law judge, who conducted evidentiary hearings in which the Moss Group, the certificated airlines and the Board's Bureau of Economics participated. (Petitioner was granted intervention in the Board investigation but did not participate in the hearings.) In due course the administrative law judge issued an initial decision in which he recommended the dismissal of

the Moss Group's complaint (see Petitioner's Appendix in the Court of Appeals, pp. 55-101).

On review of the initial decision, the Board concluded that the fares in question, although procedurally defective, had not been unjust and unreasonable. Finding that the fares had failed to yield the carriers anything approaching a fair return on their investments, the Board held that the carriers had not been unjustly enriched and that it would be inequitable to levy a refund against them. On that basis, the Board ordered the Moss Group's complaint dismissed (see Petitioner's Appendix in the Court of Appeals, pp. 104-48).

The Moss Group and petitioner sought review of the Board's order in the Court of Appeals for the District of Columbia Circuit, pursuant to Section 1006(a) of the Federal Aviation Act, as amended, 49 U.S.C. 1486(a). The certificated airlines (including respondents American Airlines, Inc., Eastern Air Lines, Inc., Trans World Airlines, Inc., and United Airlines, Inc.) intervened in support of the Board's order.

On October 16, 1975, the Court of Appeals rendered its decision affirming the Board's order in all respects. The court found that, in ruling on the Moss Group's complaint, the Board had properly focused on both the reasonableness of the fares in question and the equity of allowing restitution. After reviewing the evidence considered by the Board, the court concluded that the Board was justified in dismissing the complaint on the grounds that the fares were not unjust and unreasonable and that restitution would be inequitable (see Appendix A of the Petition).

Upon being advised of the Board's dismissal of the Moss Group's complaint and the basis therefor, the District Court for the Northern District of Illinois had, in December 1973, dismissed petitioner's suit and the other similar suits pending before it. This action (modified so as to grant the defendants summary judgment) was affirmed by the Court of Appeals for the Seventh Circuit in December 1975. That court expressed its agreement with the decision of the Court of Appeals for the District of Columbia Circuit, which it found to bar any recovery by petitioner (see Appendix D of the Petition).

Petitioner then filed his petition for a writ of certiorari in this Court, challenging the affirmance by the Court of Appeals for the District of Columbia Circuit of the Civil Aeronautics Board order dismissing the Moss Group's complaint. The Moss Group did not petition for a writ of certiorari to review that decision.

ARGUMENT

Petitioner has offered no substantial reason for asking this Court to review the decision of the Court of Appeals. He points to no decision of another court of appeals or of this Court with which the lower court's decision is in conflict. He presents no important question of federal law that needs to be settled by this Court. He identifies no departure from the accepted and usual course of judicial proceedings. The only ground for further review revealed by his petition is his thorough disagreement with the decision below. That, of course, is not a sufficient basis for the exercise of this Court's certiorari jurisdiction, see *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923). Accordingly, his petition should be denied.

The Court of Appeals held that recovery of allegedly excessive airline fares collected under procedurally defective tariffs depends on whether the fares were unreasonable and whether restitution would be equitable (Petition, App. A, p. 18). It also held that the Civil Aeronautics Board should pass on these issues in the first instance (*id.* at p. 19). These holdings were based on a thorough and perceptive analysis of pertinent cases, including this Court's leading decisions in *Atlantic Coast Line R.R.* v. *Florida,* 295 U.S. 301 (1935), and *United States* v. *Morgan,* 307 U.S. 183 (1939) (Petition, App. A, pp. 9-17). Then, turning to the circumstances of this case, the lower court upheld the Board's findings that the fares at issue here were not unreasonable and that it would be inequitable to require the carriers to refund any part of them (*id.* at pp. 19-30).

Although petitioner articulates his challenge to the decision below in terms of five separate "Questions Presented" (Petition, pp. 4-5), they represent but variations on a single theme. The basic issue that petitioner raises here (as he did in the Court of Appeals) is whether the Board may lawfully make an authoritative determination as to the reasonableness of past fares that have been judicially invalidated. The reason for his pressing this particular issue is not difficult to divine: it was on the basis of the Board's determinations in this case (as affirmed by the court below) that the District Court for the Northern District of Illinois (as affirmed by the Court of Appeals for the Seventh Circuit) rejected petitioner's claim for the recovery of allegedly excessive airline fares paid by him in 1969 and 1970.[1]

[1] Although petitioner's suit purported to be a class action, no

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Petitioner asserts that the lower court's resolution of this issue should be reviewed by this Court for two reasons. First, he claims that the decision below "disrupts the traditional allocation of functions between the courts and the Civil Aeronautics Board" by sanctioning agency adjudication of claims cognizable in the courts (Petition, pp. 18-20). Second, he contends that the court's decision, in allowing the Board to "immunize" past unlawful conduct, "is unprecedented and contrary to the statutory limitations on that agency's powers" (*id.* at pp. 20-21).[2] As we now show, neither of these reasons for granting a writ of certiorari has any substance.

Far from disrupting the traditional allocation of functions between court and agency, the decision below simply recognizes the distribution of responsibilities mandated by the doctrine of primary jurisdiction. That time-honored doctrine "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties," *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 63 (1956). The *Atlantic Coast Line* case,

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class determination was made by the District Court in Illinois, and the Seventh Circuit treated the suit as one "brought by the named plaintiff only" (Petition, App. D, p. 50).

[2] Petitioner also raises the "corollary" point that the Board's action was beyond the scope of the judicial mandate in *Moss* v. *CAB*, 430 F.2d 891 (D.C. Cir. 1970) (Petition, pp. 21-22). Aside from the fact that the Board's investigation did not purport to be in response to a mandate from the Court of Appeals but was instituted upon complaint filed by the Moss Group, the Court of Appeals itself would seem to be the best judge of whether its prior mandate had been violated. Although petitioner made this same argument to the court below, the court (two of whose members were on the original *Moss* panel) obviously was not persuaded.

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supra, teaches that, when a suit has been brought for restitution of rate overcharges, the administrative agency should initially determine the reasonableness of the rates and "whether injustice had been done," see 295 U.S. at 311-12. In such cases, agency and court have coordinate functions; "neither can rightly be regarded by the other as an alien intruder," *United States* v. *Morgan, supra,* 307 U.S. at 191.

Nor does the lower court's recognition of primary agency jurisdiction result in the extinguishment of private remedies or the exclusion of the courts from their adjudication, as petitioner contends (Petition, pp. 4, 18). The decision below cast no doubt whatever upon the continuing availability of a judicial remedy for restitution (see Petition, App. A, pp. 8-9 and n.6). Moreover, while an agency's determinations as to matters within its special competence are entitled to judicial deference, they are by no means conclusive upon the courts, see *Atlantic Coast Line R.R.* v. *Florida, supra,* 295 U.S. at 317. The case at hand is illustrative: the searching review to which the court below subjected the Board's findings and conclusions on reasonableness and equitable considerations (see Petition, App. A, pp. 19-30) belies any contention that the courts are left with no role to play in rate restitution cases.[3]

Petitioner's second asserted reason for granting the writ is equally lacking in merit. The Board's author-

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[3] Petitioner's case is not strengthened by his reliance on the "saving clause" of the Federal Aviation Act, Section 1106, 49 U.S.C. 1506 (Petition, pp. 7, 18-22). This Court long ago held that primary agency jurisdiction is not defeated by such a clause, *Mitchell Coal & Coke Co.* v. *Pennsylvania R.R.*, 230 U.S. 247, 256-60 (1913).

ity to inquire into the reasonableness of past fares is not open to serious question. This proceeding was instituted when the Moss Group filed a complaint with the Board, and the Board has ample power to investigate such complaints under Section 1002(a) of the Federal Aviation Act, 49 U.S.C. 1482(a). Sections 204(a) and 1002(b) of the Act, 49 U.S.C. 1324(a), 1482(b), grant the Board equally broad authority to conduct investigations on its own initiative. It was on the basis of just such statutory provisions as these that this Court sustained the administrative inquiry into the reasonableness of past rates in *United States* v. *Morgan, supra,* 307 U.S. at 192-93.

Petitioner also attacks the Board's inquiry as involving the retroactive validation of tariffs judicially held to have been unlawful (Petition, pp. 9-12, 20-21). On the contrary, the Board did not purport to prescribe, *nunc pro tunc,* the lawful fares for the period during which the invalidated tariffs were in effect. What the Board did was to find that the amounts collected pursuant to those tariffs were not excessive and that it would be unjust to require the carriers to disgorge any part of them. The court below was echoing this Court's pronouncements when it said, "It is true that the Board cannot make rates retrospectively, * * * but this is not the same thing as inquiring into the propriety of relief and into any issue on which relief turns" (Petition, App. A, p. 17 n.19); see *Atlantic Coast Line R.R.* v. *Florida, supra,* 295 U.S. at 312.

From what has been said above, it is readily apparent that, at every turn, petitioner's arguments collide head-on with this Court's decisions in the *Atlantic Coast Line* and *Morgan* cases. In an attempt

to avoid the force of those decisions, petitioner contends that their holdings have in effect been qualified by the Court's more recent decision in *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1962). There the Court said that

> the survival of a judicial remedy [against a carrier] * * * cannot be determined on the presence or absence in the Commission of primary jurisdiction to decide the basic question on which relief depends. Survival depends on the effect of the exercise of the remedy upon the statutory scheme of regulation. [371 U.S. at 89.]

Building on that premise, petitioner claims that, since allowing redress for "collusive misconduct" on the part of the carriers would not adversely affect the regulatory scheme of the Federal Aviation Act, the instant claims for restitution "survive" (Petition, pp. 7-8, 18-19, 21). This line of argument misses the mark on several counts.

To begin with, *Hewitt-Robins* is inapposite, for the court below did not rule against the survival of a judicial remedy for restitution (see Petition, App. A, pp. 8-9 and n.6). Furthermore, *Hewitt-Robins* did *not* hold (as petitioner implies) that judicial deference to an agency's primary jurisdiction becomes unnecessary where the availability of a judicial remedy would be consistent with the statutory scheme. Quite the opposite: the Court held that the crucial substantive issue in that case—the lawfulness of the carrier's routing practice—must indeed be initially determined by the Interstate Commerce Commission.[4] Thus, in

[4] It is entirely misleading to say, as petitioner does, that "[i]n *Hewitt-Robins*, this Court held that a private remedy for misrouting survived even though the rates were reasonable and that the

recognizing that there is no incompatibility between the existence of a judicial remedy and submission to an agency's primary jurisdiction, *Hewitt-Robins* fully supports the decision below.

Finally, petitioner's accusation of "collusive misconduct" on the part of the carriers, repeated throughout his petition (pp. 8, 15, 16, 17, 18, 19, 20, 21, 22, 23), is without the slightest foundation. This characterization presumably refers to the circumstance that, before issuing the fare order invalidated in *Moss* v. *CAB*, 430 F.2d 891 (D.C. Cir. 1970), the Board had met with representatives of the carriers (see 430 F.2d at 893, 894). The fact is that these meetings, which were initiated by the Board, were part of a process by which the Board exerted "great, if not actually irresistible" pressure on unwilling carriers "to file rates conforming exactly with the Board's [fare-construction] formula" (430 F.2d at 897). The carriers had filed for substantially greater fare relief than the Board intended to allow them, and the Board forced the carriers to abandon their larger increases "by threatening to use its power to suspend proposed rates" (*ibid.*).[5]

In short, the carriers were every bit as much prejudiced by the ratemaking procedures invalidated in the original *Moss* case as was the traveling public. In

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Interstate Commerce Commission had exercised its primary jurisdiction in making its 'reasonableness' determination" (Petition, pp. 18-19). The Commission's "reasonableness" determination related to the carrier's *routing practice*, not its rates, and the Commission found that practice to be *unreasonable* (371 U.S. at 84-85).

[5] In addition, the Board used its fare order to compel the trunklines to adopt joint-fare and divisions practices to which they strenuously objected, see CAB Order 73-7-39, July 11, 1973, pp. 31-32 (Petitioner's Appendix in the Court of Appeals, pp. 135-36).

these circumstances, to suggest that the Board's actions were the product of "collusion" or "misconduct" by the carriers is to take inadmissible liberties with the facts. Certainly the original *Moss* court and the court below (which had two panel members in common) showed no disposition to view the carriers' role in such terms. Thus, even if *Hewitt-Robins* had "liberated" the courts from the constraints of primary jurisdiction in cases involving "collusive misconduct" by regulated carriers (which, of course, it did not), petitioner could not establish the factual basis for invoking such a doctrine.

CONCLUSION

In the decision challenged by petitioner, the Court of Appeals scrupulously applied the principles laid down by this Court in *Atlantic Coast Line R.R.* v. *Florida* and *United States* v. *Morgan* to the particular factual setting of this case. Petitioner has not demonstrated that the court below departed from those principles or that there is any warrant for this Court to reconsider them. Nor has he advanced any other substantial reason for asking this Court to exercise its discretionary jurisdiction to review the lower court's decision. Consequently, his petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 1976

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